In The

Supreme Court of the United States

Supreme Court, U.S.
FILED

No. 06-840 OCT 16 2006

OFFICE OF THE CLERK

Sherlan Adams, (Agency No. 36-844-875)
Petitioner,

vs.

Alberto Gonzales, US Attorney General
Respondent.

On Petition For Writ of Certiorari To The United States
Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

By: Sandra Greene, Esquire
2001East Market Street, 2nd Floor
York, Pennsylvania 17402
(717) 755-8188
Attorney For Petitioner
Sherlan Adams

QUESTION PRESENTED

The Petitioner is Sherlan Adams, a native and former citizen of Trinidad and an individual who asserts status as a citizen of the United States, and, in the alternative, status as a national of the United States due to his service in the United States military. The US Court of Appeals for the Third Circuit asserted lack of jurisdiction to consider the Petitioner's request for review of the agency decision below asserting that the Petitioner is removable from the United States. In the proceedings before the Court of Appeals, the Respondent asserted that the court was without jurisdiction to adjudicate the Petitioner's petition for review. The legal basis for the Respondent's jurisdictional challenge was its interpretation of the provisions of the ***Real ID Act***. The Respondent asserted that the statute required dismissal of an appeal transferred to the Court of Appeals from a US District court where the appeal to the District Court was filed after the enactment of the ***Real ID Act***.

The Respondent's jurisdictional challenge was itself, however, untimely as its claim could have, and should have been raised prior to the transfer of the appeal to the US Court of Appeals, but was not. Additionally, the Respondent presented no good cause for its failure to present the jurisdictional challenge before the District Court.

More importantly, however, the language of the ***Real ID Act***, specifically prohibited the dismissal of an appeal transferred to the Court of Appeals by the District Court on the basis of untimeliness. Further, the Petitioner filed his appeal pro se as a petition for habeas relief and could not be expected to know that the enactment of the ***Real ID Act*** effectively eliminated habeas relief for challenges to the Respondent's adverse removal determinations. He could also not be expected to know that the filing deadlines had

changed and that his petition for review had to be filed with in 30 days of the final agency decision rather than at anytime prior to his removal from the United States. The Court Of Appeals erred in asserting a lack of jurisdiction over Petitioner's appeal, as the Petitioner should be excused from the harsh consequences of the jurisdictional shifting provisions of the ***Real ID Act*** that have left him without a forum in which to raise his citizenship and nationality claims.

The question presented is:

Whether the US Court of Appeals for the Third Circuit erred in determining that provisions of the ***Real ID Act*** required the Court of Appeals to assert a lack of jurisdiction to consider the Petitioner's petition for review where the specific language of the Act prohibited dismissal of an appeal for untimeliness at anytime after the appeal has been transferred to the Court of Appeals from a US District Court, where the Respondent failed to raise any jurisdictional challenges before the District Court below and where the Petitioner, formerly pro-se, was at all times relevant to the issues raised in this appeal, an alien detained in the Respondent's custody, could not reasonably be expected to have knowledge of the enactment of the ***Real ID Act*** or the applicable deadlines or the jurisdictional shifting provisions of the Act, such that his filing of a petition for habeas corpus to challenge the Respondent's adverse removal determination, rather than a petition for review within 30 days of the final agency determination, should have been excused and his federal appeal adjudicated?

PARTIES TO THE PROCEEDINGS

Petitioner is Sherlan Adams. Respondent is Alberto Gonzales, the Attorney General of the United States.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Sherlan Adams, respectfully petitions for a writ of *certiorari* to review the decision below judgment of the United States Court Of Appeals for the Third Circuit.

OPINIONS BELOW

The opinions of the Court of Appeals below on both the original appeal and the petition for rehearing are unreported.

JURISDICTION

The judgment of the court of appeal on the original appeal was entered on June 5, 2006. The decision of the Court of Appeals denying the petition for rehearing was entered on July 17, 2006 The jurisdiction of this court is invoked pursuant to 28 USC sections 1254(1).

Constitutional and Statutory Provisions Involved

Reprinted in an appendix to this petition are pertinent provisions of the Immigration and Nationality Act, 8 USC section 1252(b), as well as the ***Real ID Act***, Pub.L. No. 109-13, Div. B, 119 Stat. 231 (2005), and the due process clause of the United States Constitution.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the ***Real ID Act***, Pub.L. No. 109-13, Div. B, 119 Stat. 231 (2005) are set out in an appendix to this petition. (Pet. App. D at 7a)

STATEMENT OF THE CASE

1. Statutory Background

This case presents a question as to the proper interpretation of the provisions of the ***Real ID Act*** related to the transfer of habeas appeals involving legal challenges to adverse findings of the Executive Office For

Immigration Review from the US District Courts to US Courts Of Appeals, as well as the applicability of the filing deadlines outlined in the Act to pro-se individuals detained in the Respondent's custody who had limited access to information regarding the jurisdictional shifting provisions of the Act and/or its filing deadlines.

The Respondent challenged the jurisdiction of the Court of Appeals to consider the Petitioner's appeal because it asserted that the Petitioner filed his habeas action with the District Court more than 30 days after the final agency decision was issued by the Board of Immigration Appeals and thus, the District Court was without jurisdiction to consider the appeal or transfer it to the Court of Appeals. The Respondent failed to raise this issue before the District Court prior to its transfer of the appeal to the Court of Appeals.

The plain language of the ***Real ID Act*** contradicted the Respondent's jurisdictional challenge, and rendered the findings of the Court of Appeals error. In pertinent part, the ***Real ID Act*** states: " ...The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section..., ***except that subsection (b)(1)[30 day time limit] of such section shall not apply***. (emphasis added). [See ***Real ID Act*** of 2005 Pub. L. No. 109-13, 119Stat 231(May 11, 2005)]

The Petitioner asserts that the Court of Appeals erred in asserting that it lacked jurisdiction to consider the Petitioner's appeal because the express language of the ***Real ID Act*** prohibited dismissal of the appeal by the Court of Appeals on the basis of alleged untimeliness at any time subsequent to the transfer of the appeal by the District Court and the Respondent failed to raise its

jurisdictional challenge before the District Court. Thus, the Petitioner asserts that the adverse finding of the Court of Appeals was in error and a violation of his right to due process of law.

2. Proceedings Below

Petitioner, Sherlan Adams, by and through Counsel, Sandra Greene, Esquire, hereby petitions for a writ of certiorari following the dismissal of his original appeal as presented to the US Court Of Appeals for the Third Circuit upon transfer to that court by the US District Court for the Eastern District Of Pennsylvania pursuant to the provisions of the ***Real ID Act***, as well as his petition for rehearing. The Court of Appeals asserted lack of jurisdiction to consider the appeal pursuant to the provisions of the ***Real ID Act***, upon the Respondent's motion to dismiss. The original panel asserted that inasmuch as Petitioner's underlying habeas action was not filed until after May 11, 2005, the action was untimely and it had no jurisdiction to the claims raised therein after transfer of the appeal by the District Court. The panel's decision was entered on or about June 5, 2006.

The Petitioner asserted that the original panel erred in entering its decision and sought rehearing. The Petitioner asserted that the ***Real ID Act*** prohibited the Court of Appeals from making any jurisdictional determinations regarding appeals transferred to the court by operation of the Act subsequent to actual transfer of the appeal by the US District Court. Moreover, the Petitioner asserted that the panel's determination was unconstitutional in that it results in the impermissible consequence of denying the Petitioner a forum in which to be heard regarding his nationality and citizenship

claims. Due to the heightened due process interests and obligations attached to Petitioner's asserted claims, the Petitioner asserted that the ***Real ID Act*** could not rightly be interpreted in a manner that purports to give Congressional sanction to a technical denial to Petitioner, a then pro-se detained litigant, of an opportunity to have his claims adjudicated based on a recent change in law that he could not rightly be expected to have known about.

Petitioner asserted that Congress, through enactment of the ***Real ID Act*** and the imposition of limitations on the availability of habeas review, never intended to forever foreclose to Petitioner, and those similarly situated to him, the opportunity to be heard on their citizenship and nationality claims simply because those claims were not filed with the District Court on or before May 11, 2005 when they were detained in the Respondent's custody and had scant access to information regarding the enactment of the law or sufficient knowledge to understand that habeas actions could no longer be filed to challenge removal determinations.

The Petitioner, a veteran who was honorably discharged from service in the US military, challenged the Respondent's adverse removal determination as he asserted eligibility to naturalize pursuant to 8 USC sections 1429 and 1440 and raised a claim that he is a national of the United States due to his military service and assertion of allegiance to the United States.

Reasons For Granting the Petition

The question presented raises issues of first impression regarding the interpretation of the ***Real ID Act***. Petitioner challenges the assertion of the Court of

Appeals that the Act be interpreted so as to prohibit adjudication of claims raised by Petitioner, a detained pro-se litigant, because those claims were not presented on or before May 11, 2005, where the Petitioner had no reasonable opportunity to know that he could no longer file a petition for habeas corpus following enactment of the ***Real ID Act***, jurisdictional scheme in place for years prior to the ***Real ID Act*** required that individuals such as the Petitioner file petitions for habeas corpus to challenge removal orders, without regard to a 30 day deadline, so long as the petition was filed prior to the individual's actual removal from the United States and all considerations of fairness and due process required that the Petitioner be excused for his alleged late filing, especially given the fact that the Respondent failed to raise its jurisdictional challenge before the US District Court prior to the transfer of the appeal to the US Court of Appeals and the express language of the ***Real ID Act*** prohibits dismissal of an appeal for alleged untimeliness subsequent to the transfer of an appeal to the US Court Of Appeals.

In its motion, the Respondent asserted that the Court of Appeals lacked jurisdiction to consider the merits of the Petitioner's appeal. Specifically, the Respondent asserted that the Petitioner's habeas action was untimely filed because the decision of the Board of Immigration Appeals was issued on or about May 12, 2005 one day after the enactment of the ***Real ID Act***, and the docketing materials from the District Court indicated that the Petitioner's habeas action was not filed until August 22, 2005. Moreover, the Respondent asserted that since the Petitioner failed to file a petition for review within 30 days of the Board's decision, the

District Court was without jurisdiction to transfer the habeas action to the Court of Appeals pursuant to the ***Real ID Act***, Pub.L. No. 109-13, Div. B, 119 Stat. 231 (2005).

The plain language of the ***Real ID Act*** contradicted the Respondent's jurisdictional challenge as well as the findings of the Court of Appeals permitting the grant of the Respondent's the motion to dismiss. In pertinent part, the ***Real ID Act*** states: " ...The court of appeals shall treat the transferred case as if it had been file pursuant to a petition for review under such section..., ***except that subsection (b)(1)[30 day time limit] of such section shall not apply***. (emphasis added). [See ***Real ID Act*** of 2005 Pub. L. No. 109-13, 119 Stat 231(May 11, 2005)]

Petitioner asserts that once his habeas action was transferred to the Court of Appeals by the District Court pursuant to the ***Real ID Act***, the Court of Appeals, by the plain language of the statute, was required to adjudicate the merits of the appeal and could not reject it on the basis that it lacked jurisdiction to adjudicate the appeal because the Petitioner failed to comply with a 30 deadline or upon some other assertion that it was not timely filed. The statute states explicitly that the Court of Appeals ***shall*** treat the transferred case as if it had been filed as a petition for review and states that the 30 day time limit ***shall*** not apply.

Stated differently, any jurisdictional challenge due to the alleged untimely filing before the District Court had to be raised before the District Court , which the Respondent failed to do, because, once the transfer to the Court of Appeals was effectuated, the jurisdiction of the Court Of Appeals became perfected. Thus, there was

no justifiable challenge to the jurisdiction of the Court of Appeals to adjudicate the Petitioner's appeal and the Respondent's challenge should have been rejected. In its decisions, the Court of Appeals made no attempt to reconcile its decision with the express language of the Act .

Accordingly, any challenge Respondent wished to raise regarding jurisdiction should have been filed with the District Court. Further, the Respondent failed to file a timely appeal of the District Court's decision to transfer the Petitioner's appeal . Any such appeal was due to be filed on or before June 26, 2006. No such appeal was filed. The time for filing any such appeal has expired.

Additionally, the Respondent offered absolutely no explanation as to why it failed to raise the jurisdictional challenge before the District Court, which is where the challenge should have been presented.

Importantly, there was an independent basis, without regard to the provisions of the ***Real ID Act***, for the Court of Appeals to permit adjudication of the Petitioner's citizenship/nationality without regard to its alleged untimeliness. Federal courts have general recognized that statutes that purport to foreclose all avenues of review can raise serious constitutional questions and that, under such circumstances, judicial review may, nonetheless be appropriate. *McNary v. Haitian Refugee Center, Inc.* 498 US 479 (1991) Moreover, such review should especially be permitted where it is in the best interests of justice to permit it. Federal courts have also held that a federal action that would be time-barred unless a transfer was granted satisfies the interest of justice test. *Rodriguez-Roman v.*

INS, 98 F.3d 416 (9th Cir. 1996)

In this case, the Petitioner, filing pro-se, sought review of the agency's adverse determination and, was apparently unaware of the enactment of the ***Real ID Act*** and its applicability to his desired appeal. The Board of Immigration Appeals rendered its decision on the Petitioner's claim only one day after the Act was enacted. The Petitioner was detained in the Respondent's custody at the York County Prison and proceeded to file a pro-se habeas action as that had been the established manner in which to challenged adverse removal actions for many, many years. The Petitioner's appeal raised claims regarding his assertion of eligibility for naturalization and status as a national of the United States.

As noted by the 9th Circuit in *Baeta v. Sonchik*, 273 F.3d 1261 (9th Cir. 2001):

> ...Because the purpose of the transfer statute 'Is to aid litigants who were confused about the proper forum for review', a petition that would be time barred without a transfer satisfies the interest of justice test..
>
> [citing *Rodriguez-Roman*) at 16233

Here, the Petitioner filed an action in the district court that should have been filed in the Court of Appeals. ***The Real ID Act*** requires that, where an alien raises a claim of US citizenship/nationality in removal proceedings, the Court of Appeals is tasked to make an initial determination as to whether there is a genuine issue as to material fact of the citizenship/nationality

status of the individual concerned. Here, due to the lack of knowledge that of habeas jurisdiction to challenge removal orders was no longer in operation within District Courts and the proper forum in which to present a citizenship claim was the Court of Appeals, the pro-se Petitioner filed his appeal with the District Court in error. Prior to the enactment of the ***Real ID Act***, such appeals were permitted so long as they were filed prior to the individual's removal from the United States and were not required to be filed within 30 days of the issuance of a final order from the agency. Petitioner, as a pro-se detained litigant, was unaware of this change in law.

The fact remains, however, that the Court of Appeals was the proper forum in which the Petitioner's citizenship claims should have been heard. The district court's transfer of the case should have been deemed to be sufficient to confer jurisdiction in view of the Petitioner's former pro-se status, the confusing nature of the jurisdiction shifting impact of the ***Real ID Act*** and the federal tradition of permitting jurisdiction where it is in the best interests of justice to do so.

Conclusion

WHEREFORE, for all the aforementioned reasons, Petitioner respectfully asks that his petition for writ of certiorari be GRANTED.

Sincerely,
SANDRA GREENE,
Attorney Of Record
2001 East Market Street,
2nd Floor
York, Pennsylvania 17402

(717) 755- 8188
(717) 843-0417 *fax*
Attorney For Petitioner,
Sherlan Adams

Dated: October 16, 2006

United States Court Of Appeals,
Third Circuit
Sherlan ADAMS, Petitioner,
v.
Attorney General Of The United States, Respondent
No. 06-1623
Agency No. A36-844-875

Present: FUENTES, VAN ANTWERPEN AND Roth[1], Circuit Judges

Submitted are:

(1) Respondent's motion to dismiss for lack of jurisdiction; and

(2) Petitioner's reply

In the above-captioned case.

Respectfully,

Clerk

MMW/RA/lml

ORDER

The foregoing motion to dismiss for lack of jurisdiction is granted, and the petition for review is hereby dismissed as untimely. A petition for review must be filed not later

than thirty days after the date of the final order of removal. See 8 U.S.C. Section 1252(b)(1);McAlister v. Attorney General, _F. 3d_2006 WL903203,*3(3d Cir. Apr. 10, 2006). This thirty-day period does not apply to a habeas corpus petition pending in the district court on May 11, 2005, the effective date of the REAL ID Act, and transferred to the appropriate court of appeals to be treated as a petition for review. Petitioner's habeas petition, which was transferred in part to this court, was not pending in any district court on May 11, 2005. Accordingly, the thirty-day period applies. The BIA entered the final order of removal on May 12, 2005. Petitioner filed his habeas corpus petition in the Southern District Of New York on July 29, 2005, well beyond the thirty-day period.

By the Court,

/s/Franklin S. Van Antwerpen
Circuit Judge

Dated: June 5, 2006
LMI/cc: Sandra L. Greene, Esq.
Daryl F. Bloom, Esq.

[1]Judge Roth assumed senior status on May 31, 2006

DPS-193

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1623

SHERLAN L. ADAMS,
Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES
OF AMERICA,
Respondent

Present: SCIRICA, Chief Judge , SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, CHAGARES, And ROTH* Circuit Judges

---

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

---

* Honorable Jane R. Roth vote limited to panel rehearing only.

The petition for rehearing filed by Petitioner having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is hereby denied.

By the Court,

/s/ Franklin S. Van Antwerpen
Circuit Judge

Dated: July 17, 2006
LMI/cc:Sandra Greene, Esq.
Daryl F. Bloom, Esq.

Received and Filed

7-17-06 jml
Marcia M. Waldron,
Clerk

Seal
United States
Department of Justice

U.S. Department Of Justice
Executive Office For
Immigration Review
Board Of Immigration Appeals
Office Of The Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

ADAMS, SHERLAN LINTON
3400 CONCORD ROAD
YORK, PA 17402-0000

INS LIT./ York Co.
Prison/YOR
3400 Concord Road
York, PA 17402

Name: ADAMS, SHERLAN LINTON A36-844-875

Date of this notice: 05/12/2005

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,
/s/ Frank Krider
Frank Krider
Chief Clerk

Enclosure
Panel Members:
MOSCATO, ANTHONY C.

U.S. Department of Justice
Executive Office for
Immigration Review
Falls Church, Virginia 22041

Decision of the Board Of
Immigration Appeals

File: A36-844-875 - York Date: MAY 12, 2005

In re: ADAMS, SHERLAN LINTON

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ORDER:

PER CURIAM. The respondent has appealed from the Immigration Judge's decision dated January 11, 2005. We have reviewed the record. We agree that the respondent's conviction for section 220.16(1), qualifies as an aggravated felony for immigration purposes and renders the respondent removable and ineligible for any relief. See sections 101(a)(43)(B) and 237(a)(iii) of the Immigration and Nationality Act, 8 U.S.C. Sections1101(a)(43)(B), 1227(a)(iii). We note that the Board cannot entertain collateral attacks on a judgment of conviction unless that judgment is void on its face, and that the Board cannot go behind the judicial record to

examine an alien's claims regarding his guilt or innocence. See Matter of Madrigal-Calvo, 21 I&N Dec. 323, 327 (BIA 1996). Insofar as the respondent asserts that he is not subject to removal because he is a United States national by virtue of oath of allegiance and military service, we note that such status may only be conferred by birth or naturalization. See Matter of Navas-Acosta, 23 I&N Dec. 586 (BIA 2003). Finally, we note that the respondent was advised of his right to counsel, without expense to the Government, but that he did not avail himself of this right. We find no evidence that there were any irregularities in the Immigration Judge's conduct of proceedings and the respondent has not shown on appeal that he was deprived of a full and fair hearing. The respondent has presented no arguments on appeal which persuade us that this decision should be disturbed. Accordingly, the appeal is dismissed.

/s/ Anthony Moscato
FOR THE BOARD

PUBLIC LAW 109-13 May 11, 2005 119 STAT. 311

SEC. 106 JUDICIAL REVIEW OF ΘRDERS OF REMOVAL

(c) TRANSFER OF CASES- If an alien's case, brought under section 2241 of title 28, United States Code, and challenging a final administrative order of removal, deportation, or exclusion, is pending in a district court on the date of the enactment of this division, then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit in which a petition for review could have been properly filed under section 242(b)(2) of the Immigration and Nationality Act (8 U.S.C. 1252), as amended by this section, or under section 309(c)(4)(D) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1101 note). The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section 242, except that subsection (b)(1) of such section shall not apply.